Supreme Court, U.S.
FILED
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No. 94-859

In the Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

A. Respondents concede (Br. 9) that "harm" is "a word of extraordinary elasticity, arguably capable of the meaning" given to it by the Fish and Wildlife Service (FWS) in its regulation interpreting the prohibition in the Endangered Species Act (ESA) against the "take" of protected species. See 16 U.S.C. 1538(a)(1)(B); 50 C.F.R. 17.3. Respondents contend, however, that each of the other verbs accompanying "harm" in the ESA's definition of "take" (see 16 U.S.C. 1532(19)) describes "purposeful" conduct "directed at some living thing," and they argue that "harm" should be given the same narrow construction. Resp. Br. 7, 10, 13, 14, 16-17, 20.

Respondents' premise is flawed. The ESA does not limit the other verbs in the definition of "take" ("harass, * * * pursue, hunt, shoot, wound, kill, trap, capture, or collect") to "purposeful" conduct specifically "directed at a living

thing." The ESA makes it unlawful to take a protected species, through, for example, wounding or killing, regardless of whether that was the purpose of the act or whether the act was directed at a living thing. Such violations are subject to an injunctive action under 16 U.S.C. 1540(e)(6) and (g)(1)(A), and to a civil penalty of not more than $500 under 16 U.S.C. 1540(a)(1).[1]

Civil penalties of more than $500 and misdemeanor criminal sanctions are available only if the person acts "knowingly," 16 U.S.C. 1540(a)(1) and (b)(1)—*i.e.*, knows, for example, that his action harasses, harms or wounds the type of species affected. Even in such cases, however, it is not necessary to show that the person acted with the *purpose* of harming wildlife. Indeed, the person need not know that the species is endangered or threatened; only a general intent to perform the act, and not a specific intent to violate the ESA, is required.[2]

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[1] As originally enacted, the maximum civil penalty for a non-knowing violation was $1000. 16 U.S.C. 1540(a)(1) (1976). In 1978, Congress "reduce[d] the strict liability penalty for othe[r] than importers and exporters to $500." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 26 (1978); H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 25-26 (1978); see Endangered Species Act Amendments of 1978 (ESAA), Pub. L. No. 95-632, § 6(1) and (2), 92 Stat. 3761. The Conference Committee noted (at 26) that although a tourist who unknowingly violates the prohibition of importing a protected species could be fined up to $500, it "assume[d] that in most cases, law enforcement officials will seek the forfeiture of the item rather than impose a civil penalty."

[2] Respondents acknowledge that 16 U.S.C. 1540(b)(1) "requires only a general intent to perform an act, not a specific intent to violate the ESA." Resp. Br. 2 n.2 (citing *United States* v. *Nguyen*, 916 F.2d 1016 (5th Cir. 1990)). In the 1978 amendments, Congress replaced "willfully" with "knowingly" (see ESAA § 6(3), 92 Stat. 3761) to make "criminal violations of the act a general rather than a specific intent crime." H.R. Conf. Rep. No. 1804, *supra*, at 26.

Respondents err in relying on *United States* v. *FMC Corp.*, 572 F.2d 902 (2d Cir. 1978), to support their argument that all the terms in the definition of "take," including "kill," connote "intentional and directed" conduct. Resp. Br. 13 n.15. The *FMC* court affirmed a conviction for killing protected birds in violation of the narrower "take" prohibition in the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 (1988 & Supp. V 1993), based on the death of birds that were attracted to a pond containing chemicals released during the company's manufacturing process. See Gov't Br. 25 & n.12. The company did not intend to attract the birds to its pond, and its actions were in no way directed at the birds. 572 F.2d at 906-908.[3]

Because the ESA imposes a scienter requirement ("knowingly") only for certain civil penalties and misdemeanor sanctions—but not, for example, in civil injunctive actions—respondents err in relying (Br. 10 & n.10) on several dated dictionaries for the proposition that "harm" must be limited in *all* circumstances to *purposeful* efforts to injure. Respondents are even further afield in relying (Br. 19 n.24) on dictionary definitions of "take" that refer to the holding, seizure or possession of an object. Congress provided its own definition of "take" in the ESA that includes harass, harm, pursue and wound, none of which is limited to actual holding, seizure or possession.

[3] Respondents' attempt (Br. 21 n.26) to distinguish *FMC* on the ground that "[t]he manufacture and use of pesticides * * * are actions directed at killing animals" is completely without merit. There is no suggestion in *FMC* that the result would have been different if the chemical being manufactured was not a pesticide.

Respondents quote a passing comment in *FMC* that it "'would offend reason and common sense' to find that wildlife 'take' includes 'deaths caused by automobiles.'" Resp. Br. 13 n.15; see also *id.* at 21. The context shows, however, that the court was concerned only with basing criminal liability on an act that was not done knowingly. Thus, in the passage immediately following the one quoted by respondents, the court observed: "As stated in one of the early decisions under the [MBTA], '[a]n innocent technical violation on the part of any defendant can be taken care of by the imposition of a small or nominal

Respondents' basic objection to the "harm" regulation is that it "focuses exclusively on the ultimate effect of the act on listed wildlife." Resp. Br. 14. In their view, "harm" should be construed to reach only purposeful conduct directed at wildlife because the "take" prohibition is concerned with the character of the actor's conduct, rather than its effect on the species. *Ibid.* That view ignores the central purpose of the ESA: to conserve endangered and threatened species. 16 U.S.C. 1531(b). The Act accomplishes that purpose in part by prohibiting conduct that undermines a listed species' continuing survival. For example, the prohibition against wounding a protected species is not intended to save individual animals from suffering pain. Wounding is prohibited because it is likely to impair the animal's ability to engage in activity essential to its own survival and that of its offspring, *e.g.*, by impairing its ability to forage for food, build a shelter, and breed. Thus, wounding a protected species violates the ESA even if it is the unintended consequence of otherwise lawful activity directed at a different object. The character of the conduct may bear on the appropriate sanction, but not on the existence of a violation.[4]

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fine.' Such situations properly can be left to the sound discretion of prosecutors and the courts." 572 F.2d at 905 (citation omitted).

[4] Respondents argue (Br. 14) that the "harm" regulation "confuses some remote effect on a species' population with a concrete effect on some member of that species" and "also ignores the role of intervening acts in bringing about that generalized effect." Those issues, however, are properly addressed not by categorically excluding all harms to wildlife that are caused by habitat modification from the statutory "take" prohibition, but by applying principles of proximate causation, based on the regulation's condition that habitat modification is covered only if it "actually kills or injures wildlife" by significantly impairing essential behavioral patterns. Compare *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1049-1050 (1995); see,

Because the terms that accompany "harm" in the statutory definition of "take" are not limited to purposeful acts directed at wildlife, there is no merit to respondents' argument that the concededly broad term "harm" should be narrowly construed in that manner by application of *noscitur a sociis*.[5] A narrow construction that excluded

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e.g., *Forest Conservation Council* v. *Rosboro Lumber Co.*, No. 94-35070 (9th Cir. Mar. 24, 1995); *Marbled Murrelet* v. *Pacific Lumber Co.*, No. C-93-1400-LCB (N.D. Cal. Feb. 27, 1995), slip op. 55-60; Gov't Br. 45-46. Respondents, moreover, ignore the distinction between a violation of the ESA that is proven through indirect or circumstantial evidence (such as by proof of a population decline), and a situation in which there was no ESA violation at all because there was no causal link between the conduct and injury to wildlife.

[5] Contrary to respondents' contention (Br. 15 & n.17), FWS's discussion of *ejusdem generis* when it first proposed a revision of the harm regulation in 1981 (see J.A. 58) did not reflect an agreement with their position. FWS's interpretation of "take" included negligent conduct (J.A. 60) and habitat modifications that result in the actual killing or injury of wildlife (J.A. 61 & n.2, quoting *TVA* v. *Hill*, 437 U.S. 153, 165 n.16, 184 n.30 (1978)).

In the same footnote, respondents rely on *United States* v. *Hayashi*, 22 F.3d 859 (9th Cir. 1993), which construed "harass" and other forms of "take" under the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. 1361 *et seq.* See Gov't Br. 25-26 & n.13. The Ninth Circuit's conclusion that those terms connote "direct intrusions" meant something different from what respondents appear to mean by "directed at." For example, the *Hayashi* court understood hunt, capture and kill to involve "direct and significant intrusions upon the normal, life-sustaining activities of a marine mammal," explaining that "killing is a direct and permanent intrusion, while hunting and capturing cause significant disruptions of a marine mammal's natural state"; that "[t]o 'take' a marine mammal strongly suggests a serious diversion of the mammal from its natural routine"; and that the MMPA was aimed at "protecting natural animal behavior." 22 F.3d at 864, 866. The ESA "harm" regulation, which covers significant habitat modification or degradation that "actually kills or injures" wildlife by

all harm caused by habitat modification would also be inconsistent with Congress's intent to define "take" "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife," S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973); see also H.R. Rep. No. 412, 93d Cong., 1st Sess. 11, 15 (1973), and with the central role that habitat protection plays throughout the Act. Gov't Br. 7-9, 24.[6]

"significantly impairing essential behavioral patterns," is consistent with that view.

[6] Respondents erroneously rely (Br. 30-31) on the failure by the Senate committee to include in its bill certain language contained in another bill that respondents assert was "very similar" to the "harm" regulation. As we have explained (Gov't Br. 28-29), the other bill was significantly broader than the regulation because it would have barred habitat modification per se, without regard to whether there was an ensuing effect on protected species. Respondents suggest (Br. 31 n.39) that the committee's omission of the broader provision is explained by the statements of "several legislators" expressing disapproval of the inclusion of habitat modification in the "take" prohibition. They cite, however, only one statement, by Senator Stevens, and that ambiguous remark does not support their position. The subject of his remark was whether a single bill should cover endangered flora as well as fauna, not the definition of "take" applicable to fauna. Thus, the unexplained fate of the bill proposed early in the legislative process sheds little light on congressional intent. Cf. *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1492, 1495-1496 (1994).

Respondents also suggest (Br. 29 n.35, 30) that the legislative history of the 1973 Act is barren of discussion specifically relating to the precise issue here because no reasonable person could have imagined that the statutory text would support the Secretary's interpretation. That assertion is disproved by respondents' citation with approval (Br. 34 n.41) to an article, published before the Secretary's interpretation was proposed, that recognized that "harm" *could* be construed to encompass actions, such as timber harvesting, that destroy habitat. R. Lachenmeier, *The Endangered Species Act of 1973: Preservation or Pandemonium?*, 5 Envtl. L. 29, 39, 72 (1974). Furthermore, because respondents have the burden under *Chevron*

B. Respondents' narrow view of "harm" likewise cannot be squared with the subsequent amendments to Sections 7 and 10 of the ESA that specifically addressed the taking of protected species. As discussed in our opening brief (at 30-33), this Court's decision in *TVA* v. *Hill* provided the impetus for the 1978 amendments that created the process for exempting federal actions from both Section 7 and 9. The Tellico Dam at issue in *TVA* v. *Hill* was not "directed at" wildlife, yet it would have modified the snail darter's habitat to the point of rendering it extinct. For that reason, as the Court recognized (437 U.S. at 184-185 & n.30), completion of the dam would have constituted a prohibited taking under the Secretary's regulation that defined "harm" to include "significant environmental modification or degradation" that kills or injures wildlife. Gov't Br. 30-31. Congress's recognition that such a project would require an exception to the Section 9 "taking" prohibition and implementing "regulations" (see 16 U.S.C. 1536(*o*) (Supp. III 1979))—including the "harm" regulation (see Gov't Br. 32-33 & n.20)—confirms that "take" encompasses habitat modification that actually kills or injures wildlife.

The 1982 amendments also furnish compelling grounds for rejecting respondents' contention that a prohibited taking includes only purposeful conduct specifically directed at wildlife. In 1982, Congress added to Section 10 a provision for the Secretary to issue permits allowing "any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is *incidental to*, and *not the*

U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), of demonstrating either that Congress expressed its intent with respect to the precise issue or that the Secretary's interpretation is unreasonable, the absence of legislative history contrary to the Secretary's interpretation cuts against their position.

purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. 1539(a)(1)(B) (emphasis added). That statutory text is inconsistent with respondents' notion that takings that are not purposeful and are not directed at wildlife (*e.g.*, are "incidental" to otherwise lawful land use) are not covered by the taking prohibition in 16 U.S.C. 1538(a)(1)(B) in the first place. Similarly, respondents' contention that the taking prohibition is concerned with the character of the actor's conduct, not its effect on the species, is refuted by the statutory requirement that an "incidental take" permit may be issued only if the Secretary finds that "the applicant will, to the maximum extent practicable, minimize and mitigate the *impacts* of such taking." 16 U.S.C. 1539(a)(2)(A) and (B)(ii) (emphasis added); see also Gov't Br. 38-39 & nn.25-26 (discussing parallel 1982 amendments to 16 U.S.C. 1536(b)(4) and (*o*), as well as other amendments building on "harm" regulation).

Respondents suggest that Congress enacted the exempting mechanisms for incidental takes in 1982 only to address those instances in which a listed species is inadvertently captured or targeted while the actor is hunting, fishing or trapping nonlisted species. That explanation is untenable. "Incidental takes" are "situations in which it is known that a taking will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity." H.R. Rep. No. 567, 97th Cong., 2d Sess. Pt. 1, at 31 (1982). The foreseeability of incidental takes shows that Congress was not addressing accidental killings. Moreover, the House Report explains that Section 10(a) enables "private land owners" to address "situations where the unintentional taking may occur on private lands owned by a developer who has no need of a Federal permit." *Id.* at 15; accord *id.* at 31. No private landowner expressed concern that Section 9 interfered with his hunting, trapping or fishing

for nonlisted species on private lands,[7] and incidental takes that result from commercial fishing, to which respondents refer (Br. 42), are not ordinarily associated with private land ownership or development.

The incidental take that provided the model for Section 10(a) was the conversion into a housing complex of an undeveloped tract that served as habitat for listed butterflies. Yet because the bulldozing and land-clearing were "ordinary land use activities" that were not "directed at" any wildlife or conducted with a predatory purpose, those activities, despite their seriously adverse impact on the butterflies, would not have constituted a "take" under respondents' narrow interpretation. Respondents suggest (Br. 41-42, 43 n.51) that Congress focused on habitat only because it intended to prescribe a habitat conservation *remedy* for takings of listed species that inadvertently occur as the result of actions undertaken for the purpose of killing or injuring nonlisted species. That suggestion cannot be squared with Congress's recognition that in some instances habitat modification can itself constitute a "take" that would in turn require a habitat conservation plan to mitigate adverse impacts. Gov't Br. 35-38.[8]

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[7] Timber industry witnesses, however, did express concern that the "take" prohibition interfered with private timber harvests and attendant land uses that were not undertaken for the purpose of killing or injuring wildlife, yet had that unintended effect. See Gov't Br. 37 & n.23; *id.* at 31 & n.18.

[8] Amici California, et al., implausibly suggest (Br. 26) that Congress believed the land-clearing at the housing development would have killed or injured listed butterflies, not by destroying their habitat, but by physical collisions of earthmoving equipment with butterflies or larvae. The extensive discussion of the project in the Conference Report makes clear that Congress understood that the ESA posed an obstacle to the project because it would seriously impair the butterflies'

Congress's refinement of the ESA through the 1978 and 1982 amendments that directly addressed Section 9 takings constitutes a ratification of the statutory interpretation embodied in the "harm" regulation. At the very least, those amendments strongly reinforce the reasonableness of the Secretary's interpretation, and therefore require that the regulation be sustained under *Chevron*.[9]

The present case is not, as respondents suggest (Br. 40-41), like *Brown* v. *Gardner*, 115 S. Ct. 552, 556-557 (1994), in which there was no "evidence to suggest that Congress was even aware of the [agency's] interpretive position." There is ample evidence that Congress was aware both of the agency's interpretation of "harm" as including certain incidental takes that could be characterized as habitat modification, and of private landowners' dissatisfaction with that interpretation. See Gov't Br. 31-40; see also Resp. Br. 43 & n.51 (acknowledging awareness manifested in Senate Report and hearings); *Qualitex Co.* v. *Jacobson Products Co.*, No. 93-1577 (Mar. 28, 1995), slip op. 13-14 (relying on amendments enacted against "background" of administrative and judicial interpretation "strongly

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"habitat," including "their food plants." H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 30-32 (1982); Gov't Br. 35-36.

[9] Citing *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 101 (1991), respondents suggest (Br. 44) that even if Congress in 1982 acted on the assumption that "harm" could reach some land uses, it would be legally irrelevant. *West Virginia* is inapposite because it addressed an argument that congressional intent should be divined from a later Congress's treatment of an issue in a different statute. In this case, by contrast, Congress enacted amendments to the ESA itself in 1978 and 1982 that both used the word "take" or "taking" (which had already been defined in important part in the "harm" regulation) and established exempting mechanisms that are premised upon an interpretation of "take" that includes killing and injury of protected wildlife that result from significant habitat modification.

suggest[ing]" that statutory language had "come to include" color). Nor is this a situation in which Congress remained silent. It affirmatively responded to the controversy by amending the Act to allow "incidental takes," subject to consultation under Section 7 or the permit process under Section 10. Compare *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136-139 (1985); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-386 (1969).[10]

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[10] Respondents invoke the rule of lenity to support their argument that "harm" should be narrowly construed. Resp. Br. 28-29, citing *United States* v. *Thompson/Center Arms Co.*, 112 S. Ct. 2102 (1992), and *Crandon* v. *United States*, 494 U.S. 152, 157-158 (1990). Respondents did not make that argument below, and it is in any event without merit. First, this case involves a facial challenge to a regulation issued by the agency charged with administering the Act, not an application of the "take" prohibition in the context of particular conduct alleged to be in violation of the Act, as in *Thompson/Center Arms* and *Crandon*. The origins of the rule of lenity in criminal prosecutions counsel against its invocation in this quite different setting.

Second, even where it applies, the rule of lenity comes into play only at the end of the process, if the statute remains ambiguous after utilizing other tools of statutory construction. See, *e.g.*, *Smith* v. *United States*, 113 S. Ct. 2050, 2059-2060 (1993). Here, as we have explained, the text, structure and history of the Act refute respondents' contentions that the "take" prohibition applies only to purposeful conduct directed at protected wildlife, and that it categorically excludes all actual killings or injuries of wildlife that result from significant habitat modification or degradation. At the very least, the Secretary's longstanding interpretation is reasonable, and therefore is controlling under *Chevron*. Cf. *Ehlert* v. *United States*, 402 U.S. 99, 105 (1971) (deferring to agency interpretation in criminal prosecution). And because that interpretation is published in the Code of Federal Regulations, the notice goal of the rule of lenity is satisfied.

Third, respondents' position that the "take" prohibition is limited to purposeful conduct directed at wildlife is essentially an argument that

C. The remaining efforts by respondents and their amici to replace the meaning of "harm" that is now firmly embedded in the Act are without merit.

1. Respondents contend (Br. 25-26) that if the "take" prohibition applies to the killing or injuring of wildlife as a result of significant habitat modification, then it "subsumes" Section 7(a)(2) and renders that section "surplusage." Section 7(a)(2) requires every federal agency, in consultation with FWS, to ensure that actions it authorizes, funds or carries out are not likely to "jeopardize the continued existence" of a listed species or destory or adversely modify habitat of the species that has been determined by the Secretary to be critical.

In respondents' view, if everyone has a duty under Section 9 to avoid inadvertently injuring even one member of a listed species, there is nothing left of the separate federal duty to avoid actions that jeopardize the species' continued existence. Respondents misapprehend the statutory scheme. The "no jeopardy" standard establishes an absolute level of protection for a species as against federal actions covered by Section 7(a)(2) (in the absence of an exemption granted by the Endangered Species Committee under Section 7(h)). The "take" prohibition in Section 9, by contrast, is not absolute; by virtue of the 1982 amendments, FWS may allow "incidental takes" of a protected species, either in connection with federal actions through the consultation process under Section 7, or in

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scienter must be shown in every application of that prohibition, even in civil injunctive actions where scienter typically is irrelevant. The ESA's criminal provision, however, contains its own scienter requirement ("knowingly"), which furnishes an additional element of a criminal offense. Compare *Thompson/Center Arms*, 112 S. Ct. at 2110 (plurality opinion) (criminal offense had no additional element of willfulness). Accordingly, the rule of lenity furnishes no basis for reading a scienter element into the basic "take" prohibition.

connection with non-federal actions through the issuance of incidental take permits under Section 10. See 16 U.S.C. 1536(b)(4), 1539(a)(1)(B) and (2). In addition, because the Section 9 "take" prohibition does not apply of its own force to threatened species (such as the northern spotted owl), but has instead been extended to such species by regulation under Section 4(d) (see Gov't Br. 5 & n.4), FWS may carve out exceptions to the "take" prohibition for threatened species. See pages 19-20, *infra*. FWS may not, however, carve out exceptions from Section 7(a)(2) for threatened species. Similarly, as we explain in our opening brief (at 41-44), the Secretary's interpretation of "harm" does not render superfluous the provision in Section 7(a)(2) for protection of critical habitat.

Several amici assert that inclusion of habitat modification resulting in death or injury to protected wildlife in the definition of "harm" leads FWS to substitute Section 9's harm restrictions for the designation of critical habitat pursuant to the provisions added to Section 4 of the ESA in 1978 and 1982, which require consideration of economic and other factors. See State Water Contractors Br. 11-15; Nat'l Ass'n of Home Builders Br. 4-10; Congressman Baker Br. 6-21. FWS's approach to designating critical habitat of course is not at issue in this case. In any event, amici are wrong in asserting that the Secretary's interpretation of "harm" limits the role of critical habitat. To the extent critical habitat plays a relatively limited independent role as a practical matter under the ESA, it is primarily because the comprehensive evaluation required by Section 7 to determine whether a species would be jeopardized necessarily entails evaluation of impacts on its habitat, whether or not critical habitat has been formally designated for the species under Section 4.

50 C.F.R. 402.02.[11] As a result, formal designation of critical habitat often is not necessary to address habitat modification in the Section 7 context, and "the protection provided by a critical habitat designation usually only duplicates the protection provided under the section 7 jeopardy provision." 57 Fed. Reg. 36,626, 36,627 (1992).[12]

Moreover, amici lose sight of the fact that the 1978 and 1982 amendments to the ESA, which added the provisions for designation of critical habitat on which they rely, also added the provisions (discussed above) that strongly reinforce the Secretary's interpretation of "harm" as including death or injury to wildlife that is caused by significant habitat modification. Congress therefore saw no inconsistency between the Secretary's interpretation

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[11] Amici State Water Contractors, et al., argue (Br. 15) that FWS could conclude that little economic impact is felt from critical habitat designation only if "harm" is defined to include death or injuries caused by habitat modification. However, the very critical habitat designations they cite explicitly state that the listing of a species and the concomitant duty to avoid jeopardy under ESA Section 7(a)(2) encompass most of the federal agency obligations regarding critical habitat. See, *e.g.*, 59 Fed. Reg. 65,260, 65,262, 65,274-65,275 (1994) (Delta smelt); 57 Fed. Reg. 36,626, 36,627, 36,630 (1992) (Sacramento River Winter-run Chinook salmon); *id.* at 1796, 1812-1813, 1831-1833 (northern spotted owl). The FWS's "incremental approach" to assessing the economic and other effects of a critical habitat designation has been challenged and upheld. *Trinity County Concerned Citizens* v. *Babbitt*, Civ. No. 92-1194 (D.D.C. Sept. 20, 1993).

[12] The clearest instance in which a designation of critical habitat can afford additional protection to listed species involves unoccupied potential habitat. Critical habitat is defined as including areas both "within" and "outside" the areas occupied by the species at the time of listing. 16 U.S.C. 1532(5)(A). In appropriate cases, designating unoccupied potential habitat can promote recovery of the species by providing for "natural range expansion into adjacent suitable habitat." 49 Fed. Reg. 38,904 (1984); see also 57 Fed. Reg. 36,627 (1992).

and the statutory provisions for designation of critical habitat. That conclusion is reinforced by the fact that in *TVA* v. *Hill*, which was the impetus for the 1978 amendments, this Court recognized that completion of the Tellico Dam would have violated both Section 7 (by jeopardizing the continued existence of the snail darter and destroying critical habitat the Secretary had designated for the species) *and* Section 9 (by taking the snail darter under the Secretary's "harm" regulation). See 437 U.S. at 161-162, 171-172, 184-185 & n.30. And as we have explained (Gov't Br. 32, 38, 44), Congress specifically accommodated the overlap of Sections 7 and 9 in this regard by enacting Section 7(*o*) in 1978 and reenacting it in 1982.

2. Some amici argue that "harm" should be narrowly construed to avoid questions under the Just Compensation Clause of the Fifth Amendment. See, *e.g.*, American Farm Bureau Fed'n Br. 20-26. This Court rejected the same argument in *Riverside Bayview Homes*, in holding that adjacent wetlands are included within the Clean Water Act's prohibition against the discharge of pollutants into "waters of the United States." There, as here, the statute proscribed conduct in absolute terms, with exceptions available by securing a federal permit. This Court explained that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking because "the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired," and "even if the permit is denied, there may be other viable uses available to the owner." 474 U.S. at 127.

Amici's reliance on *Bell Atlantic Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994), is misplaced. There, the broader interpretation of the regulation would *in every case* have resulted in a Fifth Amendment taking. Compare

Riverside Bayview Homes, 474 U.S. at 128 n.5 (distinguishing *United States* v. *Security Industrial Bank*, 459 U.S. 70 (1982), on that ground). Here, there is no identifiable category of situations in which application of the "harm" regulation will necessarily (or even probably) result in a Fifth Amendment taking. In fact, amici do not identify a single instance (and we know of none) in which a plaintiff has even filed a claim alleging, much less proven, a Fifth Amendment taking as the result of an application of the "harm" regulation that inhibited land use.[13]

3. Respondents assert that Congress would not have intended that the ESA interfere with the use of private property because the land use activities affected by the regulation are not otherwise substantially regulated. Resp. Br. 27-28. To the contrary, timber harvesting on non-federal lands, which is the activity that respondents allege the "harm" regulation interferes with, often requires a permit. See, *e.g.*, *Forest Conservation Council* v. *Rosboro Lumber Co.*, No. 94-35070 (9th Cir. Mar. 24, 1995), slip op. 3303; J.A. 19; see also Resp. Br. 9 n.9.

Respondents' assumption that Congress invariably acts with the intent to avoid any effect on private land use also

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[13] The suggestion by amici Arizona (Br. 24-25) and Texas (Br. 8-11) that the "harm" regulation impermissibly intrudes on state sovereignty is foreclosed by *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 283-293 (1981). Arizona's argument (Br. 15-18) that the regulation is unconstitutionally vague is not presented here. The courts below rejected respondents' vagueness challenge (Pet. App. 24a, 47a-51a, 83a-85a), and respondents did not seek review of that holding. In any event, the court of appeals correctly held that unless a regulation is vague in all its applications, it cannot be declared void on its face, see *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982), and that the "harm" regulation contains limiting features that prevent it from being vague in all applications. Pet. App. 49a-50a.

is without foundation in law or experience—especially where, as here, significant environmental values of national concern are present. See, *e.g.*, *Riverside Bayview Homes* (Clean Water Act); *Virginia Surface Mining* (Surface Mining Control and Reclamation Act of 1977). By amending the ESA in 1982 "to increase the flexibility in balancing species protection and conservation with development projects," H.R. Rep. No. 567, *supra*, at 10, Congress recognized that land use is affected by the Act. The prohibition on the taking of species, in conjunction with the program for authorizing incidental takes, casts jurisdiction over a wider range of activities than ultimately will be restricted. This approach rationally and flexibly addresses the inherent difficulties involved in defining prohibited conduct in light of the wide diversity of species and the range of circumstances in which they live. FWS's informal discussions with landowners and the formal Section 10 permit process furnish the means by which the balance can be struck on a case-by-case basis, so that land use activities may continue while at the same time ensuring that the number of "takes" that result will be minimized.

4. Respondents and their amici speculate about possible applications of the "harm" regulation, and they urge the Court to invalidate it in order to prevent such applications. This case, however, involves a facial challenge to the regulation (J.A. 28; Pet. App. 24a), and the regulation therefore must be sustained unless respondents establish that "no set of circumstances exists under which the [regulation] would be valid." *Reno* v. *Flores*, 113 S. Ct. 1439, 1446 (1993); see also *Anderson* v. *Edwards*, No. 93-1883 (Mar. 22, 1995), slip op. 11 n.6; Gov't Br. 19. This respondents have failed to do.

There is no merit to respondents' suggestion (Br. 37-38) that this case challenges a concrete application of the

"harm" regulation to respondents through "owl guidelines." In July, 1990, shortly after the northern spotted owl was listed as a threatened species, FWS prepared a document entitled "Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl" (J.A. 36-48). That document provided information on various aspects of ESA compliance vis-a-vis the owl, and included a section entitled "Incidental Take Guidelines under Sections 7 and 10" (J.A. 41-44). It is that section that respondents refer to as the "owl guidelines." The courts below did not make any findings regarding the application of those guidelines (or the "take" prohibition) to particular parcels of land.

Moreover, respondents fail to mention that they brought a separate suit challenging the same "owl guidelines," on the grounds that they were based on a definition of "harm" that was inconsistent with the ESA and had been developed without the notice and comment allegedly required by the Administrative Procedure Act, 5 U.S.C. 553(b). FWS subsequently withdrew the guidance. The district court then dismissed the complaint as moot, holding that FWS's rescission of the guidance provided the plaintiffs with all the relief they sought. *Sweet Home Chapter of Communities for a Great Oregon* v. *Lujan*, Civ. No. 91-2218 (D.D.C. Feb. 27, 1992), slip op. 5.

On February 17, 1995, FWS proposed new regulations under Section 4(d) of the Act to address the application of the "take" prohibition to the northern spotted owl. See Gov't Br. 5 & n.4. Among other things, the special rule would exempt private timber harvests from that prohibition in defined areas. For example, on non-federal land located in the spotted owl's range but outside specified zones where full protection is still needed, the rule would exempt incidental takings unless they result from harvesting within a 70-acre area closest to an owl's site

center (*i.e.*, nest tree, or primary roost for non-nesting owls). 60 Fed. Reg. 9484, 9485 (1995).[14] Within special zones that require somewhat greater protection, small landowners (owning less than 80 acres) would be exempted with respect to incidental takings resulting from logging activities outside an owl's site center. *Id.* at 9485. The proposal also would provide additional flexibility for small landowners, such as a program for owners of between 80 and 5000 acres of forest lands within the special zones to acquire a Section 10 permit with a minimum of red tape by using a "short form" habitat conservation plan. *Ibid.*

The proposed rule for the spotted owl is just one example of FWS's ongoing policy to assist the public in determining whether a particular activity would constitute a prohibited act under Section 9 and to streamline the process for obtaining exemptions. See, *e.g.*, 59 Fed. Reg. 34,272 (1994) (policy statement committing agencies to provide guidance and assistance to public to avoid liability for incidental takes); J.A. 43-48. Another example has been implemented in Texas, where qualified landowners may complete a simplified application form, contribute to the City of Austin Balcones Canyonlands Conservation Fund for mitigation of any taking, and usually within two months receive a permit to take listed species incidental to construction activities. See, *e.g.*, 59 Fed. Reg. 66,555-66,556 (1994) (permit application notices).

Respondents contend (Br. 37 n.45) that this case differs from *Reno* v. *Flores* because here "[t]here is no dispute

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[14] Even within the 70-acre core areas, harvest activities would not automatically constitute a prohibited taking. The proposed rule simply does not exclude such actions from coverage should a taking occur. As a biological matter, there is a substantial risk that such activities would actually kill or injure spotted owls. But as a legal matter, the

about [the "harm" regulation's] manner of application and scope." Even a cursory reading of the amici briefs dispels any notion that there is unanimity of view as to the scope and application of the regulation. Contrary to respondents' suggestion (Br. 36), moreover, here, as in *Reno* v. *Flores*, there are no findings of fact or a record concerning the agency's enforcement. Amici's scattershot introduction of material at this late stage can only provide a truncated, one-sided (and, we believe, inaccurate) view of the facts.[15] In any event, amici's arguments go beyond the scope of a facial challenge. "As the Court of Appeals * * * invalidated the regulation on its face, [this Court has] no occasion to consider whether it is valid as applied." *Bowen* v. *Yuckert*, 482 U.S. 137, 154 n.12 (1987).

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government or plaintiff in a citizen suit seeking to enforce the "take" prohibition would have the burden of proving a "take."

[15] For example, citing *Idaho Farm Bureau Fed'n* v. *Babbitt*, 839 F. Supp. 739 (D. Idaho 1993), appeals pending, Nos. 94-35164, 94-35230 (9th Cir.), amici American Farm Bureau Fed'n, et al., assert (Br. 15) that in 1985, FWS banned farmers in southwestern Idaho from pumping groundwater in order to protect a listed springsnail. To the contrary, existing groundwater pumping was never banned, and a moratorium placed in 1982 on new pumping applications was imposed by the State of Idaho, not FWS or any other federal agency, for reasons unrelated to any endangered species concerns. 58 Fed. Reg. 5938, 5941-5942 (1993). Moreover, the springsnail at issue was not even listed until January 25, 1993, years after the alleged ban on new groundwater pumping was imposed. 839 F. Supp. at 743-744.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

APRIL 1995